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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY LOREN FLORES, Defendant and Appellant.	E061151 (Super.Ct.No. FWV1302160) OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Affirmed.

C. Matthew Missakian, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, and Melissa Mandel and Stephanie H. Chow, Deputy Attorneys General, for Plaintiff and Respondent.

While defendant Anthony Loren Flores was an inmate in jail, he slashed another inmate with a razor (or other sharp object).

After a jury trial, defendant was found guilty of assault by means of force likely to produce great bodily injury. (Pen. Code, § 245, subd. (a)(4).) In a bifurcated proceeding, after waiving a jury, defendant admitted one "strike" prior. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12.) He was sentenced to a total of six years in prison, along with the usual fines, fees, and conditions.

Defendant now contends:

1. The prosecution violated defendant's *Miranda*[1] rights by introducing, as part of its case-in-chief, evidence that defendant had exercised his right to remain silent; alternatively, defense counsel rendered ineffective assistance by failing to object to this evidence.

2. Defense counsel rendered ineffective assistance by failing to use the preliminary hearing transcript to impeach the victim and the investigating officer.

We will hold that defense counsel forfeited defendant's present *Miranda* contention by failing to object at trial. We will further hold that defendant has not demonstrated ineffective assistance in any respect. Hence, we will affirm.

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436.

I

FACTUAL BACKGROUND

Juan Sanchez, an inmate at the West Valley Detention Center, was the "rep" appointed by the Mexican Mafia to oversee the Hispanic inmates in his 48-man housing segment. It was up to him to "make sure . . . everybody is well-behaved, disciplined, following rules."

Sanchez's bunk was downstairs.[2] Defendant, another inmate in Sanchez's segment, had a bunk upstairs. Defendant "had a chip on his shoulder." Sanchez had had to give defendant warnings four or five times.

On May 21, 2013, defendant went downstairs without permission — something that could get the whole unit in trouble. Sanchez gave defendant another warning. Afterwards, defendant complained to Sanchez, "I felt like you were disrespecting me."

Later that same day, there was an announcement telling an inmate named Valentino Mendoza to "roll up his stuff" because he was going to be transferred to a different facility. Mendoza came down to say goodbye to Sanchez. Defendant accompanied him.

Sanchez was sitting on his bunk. Defendant walked behind Sanchez, as if he were going to talk to another inmate. While talking to Mendoza, Sanchez noticed Mendoza making eye contact with someone behind Sanchez. Sanchez turned just as defendant hit

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[2] The People refer to Sanchez's "cell." There were no cells, just rows of bunks.

him in the head.[3] He felt something wet and realized that he had a cut over his left ear. Mendoza then punched Sanchez in the face two or three times. Sanchez was "trying to get Mendoza off" when he felt "another strike," this time to his right ear.

Sanchez asked, "What the hell do you think you're doing?" Defendant said, "We're stepping you down. Your bitch ass has to go." Sanchez saw that defendant was holding a toothbrush to which a razor blade had been attached, known as a "tomahawk."

Defendant and Mendoza tried to "recruit" other inmates nearby, including one Mike Ledezma; defendant urged, "[W]e need to get rid of him, he has to go."

Sanchez ran and pushed an emergency intercom button. Mendoza and Ledezma followed him and pinned him in a corner. Meanwhile, defendant ran to a toilet and flushed the tomahawk.

Deputy Taylor Lamson was in the control booth, which had a 360-degree view of the unit. He noticed defendant, Mendoza, and Ledezma backing Sanchez into the corner by the intercom. Deputy Lamson and a second deputy entered the area, ordered all four inmates to get on the ground, and handcuffed them.

Sanchez was bleeding from a cut to the left scalp. He also had a small cut to his right ear. He said that defendant had cut him with a razor. He did not say that defendant

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[3] Defendant claims "[t]he transcript is unclear as to whose arm delivered this first blow." Sanchez testified, however, that he was "[a]ssaulted by [defendant] from the back with a knife . . . ." He also testified that it was defendant who hit him in the head.

had flushed the razor. The dorm was searched, but no razor was found. Sanchez received four staples to close the scalp cut.

Defendant took the stand. He admitted having "little arguments" with Sanchez, "but . . . nothing major." He testified that he was upstairs with Mendoza when "[t]hey called his name to roll his stuff up." Defendant was rolling up Mendoza's mat when Mendoza said that he had to go get something from Sanchez. After rolling up the mat, defendant took it downstairs. On the way, he "heard scuffling." He then saw Mendoza and Ledezma chasing Sanchez into the corner.

Defendant admitted having "no idea" why Sanchez would try to frame him.

II

THE USE OF EVIDENCE OF DEFENDANT'S SILENCE

Defendant contends that the prosecution violated his *Miranda* rights by introducing, as part of its case-in-chief, evidence that he had exercised his right to remain silent.

A. *Additional Factual and Procedural Background.*

1. *Prosecution's case-in-chief.*

As part of the prosecution's case-in-chief, the prosecutor asked Deputy Lamson:

"Q. But as you walked in you saw Mr[.] Flores, with two others, with Sanchez in the corner in sort of a defensive position?

"A. Yes. That is correct.

"Q. This is all by the intercom pretty far from the bunks?

"A. The actual intercom . . . I would say is a good 40 feet or so. . . .

"Q. You have no idea what took place in those 40 feet outside of what Mr[.] Sanchez told you?

"A. Yes.

"Q. Did you give the other inmates a chance to talk to you?

"A. Yes.

"Q. *Any of them take advantage of that?*

"A. *No, sir.*" (Italics added.)

2. *Defense case-in-chief.*

During the prosecutor's cross-examination of defendant, there was this exchange:

"Q. And deputies gave you a chance to explain what you saw and what you did? You didn't tell them any of this stuff?

"A. Because they start accusing me of having a razor. I just didn't have nothing to do — I waited to talk to my attorney.

"Q. You had an opportunity to say, you know, I wasn't involved. I was all the way back there. I didn't see nothing?

"A. I started to tell them I wasn't involved and that's when they said, where is the razor? I don't know if it was the deputy, but the deputy started messing with me. [¶] . . . [¶] . . .

"Q. Did he give you a chance to explain?

"A. When they asked me what my statement is, that's when I said I don't have no statement.

"Q. You said no. You had a chance to explain this, you just decide not to.

"A. I told them I wasn't involved. That's when they came about me having a razor there and that —

"Q. Did you say you weren't involved or did you say 'no statement'?

"A. I said 'no statement' and 'I'm not involved.' [¶] . . . [¶] . . .

"Q. This is the first time you explained this to anybody?

"A. Well, yeah."

B. *Forfeiture.*

Defense counsel forfeited the asserted error by failing to object below. (Evid. Code, § 353, subd. (a); *People v. Holt* (1997) 15 Cal.4th 619, 666-667.)

Defendant argues that "[t]he issue is . . . cognizable because it implicates [his] due process rights." Our Supreme Court has held, however, that the failure to object forfeits a claim that the admission of evidence violates due process. (*People v. Gordon* (1990) 50 Cal.3d 1223, 1240, fn. 2, disapproved on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835; see also *People v. Partida* (2005) 37 Cal.4th 428, 435–436.)

Defendant also argues that we have discretion to reach the issue despite the forfeiture. We recognize that "[a]n appellate court is *generally* not prohibited from reaching a question that has not been preserved for review by a party. [Citations.]" (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6, italics added.) However, "it is in

fact barred when the issue involves the admission (Evid. Code, § 353) or exclusion (*id.*, § 354) of evidence." (*Ibid.*)

C. *Ineffective Assistance of Counsel.*

Defendant also contends that his trial counsel's failure to object constituted ineffective assistance.

"'To establish ineffective assistance of counsel, a defendant must show that (1) counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient performance was prejudicial, i.e., there is a reasonable probability that, but for counsel's failings, the result would have been more favorable to the defendant.' [Citation.]" (*People v. Johnson* (2015) 60 Cal.4th 966, 979-980.)

"'Unless a defendant establishes the contrary, we shall presume that "counsel's performance fell within the wide range of professional competence and that counsel's actions and inactions can be explained as a matter of sound trial strategy."' [Citation.] When the record on direct appeal sheds no light on why counsel failed to act in the manner challenged, defendant must show that there was '"'no conceivable tactical purpose'" for counsel's act or omission. [Citations.]' [Citation.]" (*People v. Centeno* (2014) 60 Cal.4th 659, 674-675.)

"The decision whether to object to the admission of evidence is 'inherently tactical,' and a failure to object will rarely reflect deficient performance by counsel. [Citation.]" (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1335.)

Under *Doyle v. Ohio* (1976) 426 U.S. 610, a defendant's silence after being given *Miranda* warnings cannot be used to impeach his or her testimony at trial. (*Id*. at pp. 616-619.) "[W]hile it is true that the *Miranda* warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial." (*Id*. at p. 618, fn. omitted.) A fortiori, the prosecution cannot use the defendant's silence after being given *Miranda* warnings in its case-in-chief. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 118.)

It has also been held that, even when a defendant has not been given *Miranda* warnings, his or her silence in response to custodial interrogation (which defendant claims he was subjected to in this case) cannot be used in the prosecution's case-in-chief. (*United States v. Velarde-Gomez* (9th Cir. 2001) 269 F.3d 1023, 1028-1030.)

As defendant concedes, however, "[t]he prosecution may use a defendant's pretrial silence as impeachment, provided the defendant has not yet been *Mirandized*. [Citations.]" (*People v. Tom* (2014) 59 Cal.4th 1210, 1223; accord, *Fletcher v. Weir* (1982) 455 U.S. 603, 605-607; *People v. Delgado* (1992) 10 Cal.App.4th 1837, 1842 [Fourth Dist., Div. Two]; *United States v. Velarde-Gomez*, *supra*, 269 F.3d 1023, 1029, fn. 1.) "In the absence of the sort of affirmative assurances embodied in the *Miranda* warnings, . . . it [does not] violate[] due process of law for a State to permit cross-

examination as to postarrest silence when a defendant chooses to take the stand." (*Fletcher v. Weir*, *supra*, 455 U.S. at p. 607.)

Here, the reference to defendant's silence in the prosecution's case-in-chief was brief and oblique. Deputy Lamson was merely asked whether *any* inmate — not just defendant — had talked to him about the incident. From the context of the question, its only immediately apparent relevance was to show that Deputy Lamson had no information beyond the little that he personally witnessed. Defense counsel could have reasoned that, as soon as defendant testified, the prosecution was almost certainly going to use his silence to impeach him; thus, this reference to his silence was de minimis and not worth objecting to.

Defendant argues that the fact that a defendant subsequently takes the stand does not authorize the prosecution to use the defendant's silence in its case-in-chief. We are not deciding, however, whether the use of defendant's silence in the prosecution's case-in-chief was or was not error; we are merely holding that defense counsel could view any such use as trivial.

Similarly, defendant argues that, if this evidence had not come in during the prosecution's case-in-chief, he might not have taken the stand. Defense counsel, however, might have known that defendant intended to take the stand regardless. Certainly, on this record, we cannot say he did *not* know.

We therefore conclude that defendant has not shown that either (1) the prosecution's introduction of evidence of his silence in its case-in-chief or (2) defense counsel's failure to object to that evidence constituted reversible error.

III

FAILURE TO USE THE PRELIMINARY HEARING TRANSCRIPT TO IMPEACH

Defendant contends that his trial counsel rendered ineffective assistance by failing to impeach Sanchez and Deputy Lamson with inconsistent statements in the preliminary hearing transcript.

A. *Additional Factual and Procedural Background.*

At the preliminary hearing, defendant was represented by a different public defender than at trial. The only witness was Deputy Lamson. He testified that Sanchez told him that defendant had cut him with "an unknown sharp object." Similarly, he testified: "[Sanchez] said [defendant] had something sharp in his hand. [Sanchez] didn't know what it was."

B. *Discussion.*

At trial, Sanchez specifically testified that he saw a tomahawk in defendant's hand; he described it as a razor attached to a toothbrush, "I believe with string." In addition, according to both Sanchez and Deputy Lamson, Sanchez specifically told Deputy Lamson that defendant cut him with a razor. Accordingly, the preliminary hearing transcript would have contradicted both Sanchez and Deputy Lamson.

"Although in extreme circumstances cross-examination may be deemed incompetent [citation], normally the decision to what extent and how to cross-examine witnesses comes within the wide range of tactical decisions competent counsel must make. [Citation.]" (*People v. Cleveland* (2004) 32 Cal.4th 704, 746.) Here, defense counsel has never been asked why he did not use the preliminary hearing transcript for impeachment. We cannot say that there could be no satisfactory explanation for his conduct. For example, for all we know, Deputy Lamson wrote a contemporaneous report recording a statement by Sanchez that defendant had a razor. In that event, attempting impeachment would have shown only that Deputy Lamson had a memory lapse at the preliminary hearing; moreover, it would have allowed the prosecution to rehabilitate both him and Sanchez and to reinforce their testimony.

Separately and alternatively, defendant has not shown a reasonable probability that attempting impeachment would have led to a more favorable result. Once again, we do not know how such an attempt would have played out. More important, even at best, it would merely have cast doubt on the testimony that Sanchez saw defendant with a tomahawk or a razor. It was indisputable, however, that somebody cut Sanchez twice with a sharp object. The sole defense was that, as the saying goes, "some other dude did it" — i.e., Mendoza, Ledezma, or some unknown person was the perpetrator.

Defendant argues, "Evidence that [Sanchez] had added details to his account that he had been unable to provide when interviewed moments after the incident would have dramatically undermined his credibility[] and cast all his testimony in a different and less

favorable light." However, there was already evidence that Sanchez told Deputy Lamson that defendant had a "small razor," whereas at trial he testified that it was a tomahawk. Moreover, at trial, he testified that defendant flushed the tomahawk down a toilet, but defense counsel established that he had not told Deputy Lamson this. Thus, there was already evidence that Sanchez was gilding the lily. Defense counsel even argued as much in closing (although he used an earthier metaphor).

We therefore conclude that defendant has not demonstrated ineffective assistance of counsel.

IV

DISPOSITION

The judgment is affirmed.

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RAMIREZ
P. J.

We concur:

MILLER
J.

CODRINGTON
J.